

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANDREW ROSS and SUSAN GERARD,

Plaintiffs,

vs.

No. 1:16-cv-01121 PJK/SMV

HECTOR BALDERAS, JR., ROBERT
GARCIA, SARAH MICHAEL
SINGLETON, FRANCIS J. MATHEW,
RAYMOND Z. ORTIZ, DAVID K.
THOMPSON, JENNIFER ATTREP, T.
GLENN ELLINGTON, SYLVIA
LAMAR, DONITA OLYMPIA SENA,
DONNA BEVACQUA-YOUNG, PAT
CASADOS, FRANK SEDILLO,
WILLIAM PACHECO, ANTONIO
GUTIERREZ, ANNA MONTOYA,
JUDAH BEN MONTANO, A. ARROYO,
E. MONTIJO, MICHELLE PORTILLO,
STEPHEN T. PACHECO, JANE
GAGNE, JOYCE BUSTOS, LYNN
PICKARD, PAMELA REYNOLDS,
ROBIN MARTINEZ, ROBERT
RICHARDS, BRENDA WALL,
AUDREY MONTOYA, and ALLSTATE
INSURANCE, INC.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT


THIS MATTER comes on for consideration of Plaintiffs' Motion for Leave to File Second Amended Complaint filed February 19, 2017. Doc. 149. Upon consideration thereof, the motion is not well taken and should be denied.

Although Federal Rule of Civil Procedure 15(a) provides that leave to amend should be liberally granted, a court may deny a motion for leave to file an amended complaint as futile if, for example, the proposed amended complaint would not survive dismissal for failure to state a claim. See Bauchman for Bachman v. W. High Sch., 132 F.3d 542, 562 (10th Cir. 1997).

The proposed second amended complaint alleges claims under § 1983 against Defendants Antonio Gutierrez, Anna Montoya, A. Arroyo, and E. Montijo in their official capacities. Doc. 149-1. A suit against a municipal or state official in his or her official capacity is a suit against that person's office, and is no different than a suit against the governmental entity itself. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). As such, to state a § 1983 official-capacity claim, a plaintiff must allege and prove a municipal custom or policy. Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978). This Plaintiffs have not done. Absent from the proposed amended complaint is any allegation that any municipal custom or policy resulted in a violation of constitutional rights. Accordingly, the proposed amended complaint would not survive a motion to dismiss, and the proposed amendment is futile.

NOW, THEREFORE, IT IS ORDERED that the Plaintiffs' Motion for Leave to File Second Amended Complaint filed February 19, 2017, (Doc. 149) is denied.

DATED this 28th day of March 2017, at Santa Fe, New Mexico.


United States Circuit Judge
Sitting by Designation

Counsel:

Arash "Asher" Kashanian, Albuquerque, New Mexico, for Plaintiffs.

Michael Dickman, Santa Fe, New Mexico, for Defendants Antonio Gutierrez and Anna Montoya.

Robert Richards, Santa Fe, New Mexico, pro se.

Luis Robles and Jordon George, Robles, Rael & Anaya, P.C., Albuquerque, New Mexico, for City Defendants Judah Ben Montano, A. Arroyo, and E. Montijo.